

STATE OF MICHIGAN
COURT OF APPEALS

DEANGELO BAILEY,

Plaintiff-Appellant,

v

MARSHALL BRUCE MATHERS III, a/k/a
EMINEM SLIM SHADY,

Defendant-Appellee.

UNPUBLISHED

April 14, 2005

No. 252123

Macomb Circuit Court

LC No. 2001-003606-NO

Before: Whitbeck, CJ, and Zahra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

Defendant, a hip hop and rap music artist, released a "Slim Shady LP" CD in 1999, which contained a song entitled "Brain Damage." The song lyrics included statements about defendant's childhood experiences with plaintiff at school. Defendant also discussed the song's lyrics for an April 29, 1999 article that was published in Rolling Stone magazine. Defendant was quoted, in part, as saying that "[e]verything in the song is true."

In August 2001, plaintiff filed the instant action alleging two counts of false-light invasion of privacy based on both the song lyrics and the Rolling Stone magazine article. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10) after identifying the potentially actionable statements in the song lyrics, finding the challenged statements in the magazine article to be essentially duplicative of the song lyrics, and finding no genuine issue of material fact with regard to the legal effect of the statements, defendant's alleged negligence, and whether the song lyrics were highly offensive or objectionable.

On appeal, plaintiff raises three issues challenging the trial court's decision to grant summary disposition in favor of defendant, but has not challenged the trial court's determination that plaintiff failed to create a genuine issue of material fact with regard to whether defendant negligently placed him in a false light concerning his character. To properly preserve an issue for appellate consideration, an appellant must raise it in the statement of questions presented. MCR 7.212(C)(5); *Meagher v McNeely & Lincoln, Inc.*, 212 Mich App 154, 156; 536 NW2d 851 (1995). Further, the failure to address a necessary issue precludes appellate relief. *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744

(1987). Plaintiff's failure to address the merits of the trial court's decision regarding negligence precludes appellate relief.

But even if we were to consider the specific issues raised by plaintiff, we would not reverse the trial court's decision. Rather, we find plaintiff's first issue regarding the substantial truth doctrine dispositive whether defendant was entitled to summary disposition under MCR 2.116(C)(10) and, accordingly, limit our review to this issue.

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In reviewing a motion under MCR 2.116(C)(10), the evidence submitted by the parties is evaluated in a light most favorable to the nonmoving party to determine if the evidence establishes a genuine issue of material fact. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2000).

In general, the tort of false-light invasion of privacy requires a plaintiff to show that the "defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position." *Duran v Detroit News*, 200 Mich App 622, 631-632; 504 NW2d 715 (1993), citing *Sawabini v Desenberg*, 143 Mich App 373, 381; 372 NW2d 559 (1985). The interest protected by the tort is that an individual not be made to appear before the public other than as the person is. *Morganroth v Whitall*, 161 Mich App 785, 793; 411 NW2d 859 (1987). The tort can be predicated on a defamatory publication, but it is not essential that the individual be defamed. *Id.* A communication is defamatory if it tends to so harm a person's reputation as to lower the person in the estimation of the community or to deter others from associating with the person. See *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992), citing 3 Restatement Torts, 2d, §559, p 156; *Sawabini*, *supra* at 379-380.

The tort of false-light invasion of privacy cannot succeed if the challenged statements are true. *Porter v City of Royal Oak*, 214 Mich App 478, 487; 542 NW2d 905 (1995). A court examines the falsity of a statement independently from the question of fault. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 334; 583 NW2d 725 (1998). Further, the tort of false-light invasion of privacy is subject to the same constitutional limitations as defamation claims that implicate First Amendment rights. *Ireland v Edwards*, 230 Mich App 607, 624; 584 NW2d 632 (1998). Hence, we must "make an independent examination of the record to ensure against forbidden intrusions into the field of free expression and to examine the statements and circumstances under which they were made to determine whether the statements are subject to First Amendment protection." *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 322; 539 NW2d 774 (1995), citing *Garvelink v Detroit News*, 206 Mich App 604, 608-609; 522 NW2d 883 (1994). To be an actionable, the statement must be provable as false and understood as stating actual facts about the plaintiff. *Ireland*, *supra* at 617.

In cases involving a media defendant, a private plaintiff, and a publication of public concern, the plaintiff is constitutionally required to prove falsity. *Rouch*, *supra* at 252. Plaintiff concedes for purposes of this appeal that the standards in *Rouch*, which were applied by the trial court, apply to this case. Therefore, for purposes of our review, we will assume that the trial

court correctly treated this case as one involving a private plaintiff, a media defendant, and a publication of public concern.

Because plaintiff has not challenged the trial court's identification of the allegedly actionable statements in both the song lyrics and the Rolling Stone article—which the trial court deemed duplicative—we will also assume for purposes of our review that plaintiff's false-light invasion of privacy claim is based on the statements in the song lyrics in which defendant accused plaintiff of shoving him into lockers at school, and of assaulting defendant in a school bathroom and banging defendant's head against a urinal, soaking his clothes in blood, and choking his throat. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Because the context in which the statements are made is critical to an assessment of the issue of falsity, we set forth the pertinent song lyrics as follows:

Way before my baby daughter Hailey
I was harassed daily by this fat kid named D'Angelo Bailey
An eighth grader who acted obnoxious, cause his father boxes
so everyday *he'd shove me in the lockers*
One day he came in the bathroom while I was pissin
And *had me in the position to beat me* into submission
He banged my head against the urinal til he broke my nose,
Soaked my clothes in blood, grabbed me and choked my throat
I tried to plead and tell him "We shouldn't beef"
But he just wouldn't leave, he kept choking me and I couldn't breathe
He looked at me and said "You gonna die honkey!"
The principal walked in (What's going on in here?)
and started helping him stomp me
I made them think they beat me to death
Holdin my breath for like five minutes before they finally left
Then I got up and ran to the janitor's storage booth
Kicked the door hinge loose and ripped out the four inch screws
Grabbed some sharp objects, brooms, and foreign tools
"This is for every time you took my orange juice,
or stole my seat in the lunchroom and drank my chocolate milk.
Every time you tipped my tray and it dropped and spilt.
I'm getting you back bully! Now once and for good."
I cocked the broomstick back and swung hard as I could
and beat him over the head with it till I broke the wood.
Knocked him down, stood on his chest with one foot. . . .
Made it home, later that same day
Started reading a comic, and suddenly everything became gray
I couldn't even see what I was tryin to read
I went deaf, and my left ear started to bleed
My mother started screamin, "What are you on, drugs?!?"
Look at you, you're gettin blood all over my rug!" (Sorry!)
She beat me over the head with the remote control
opened a hole, and my whole brain fell out of my skull
[Emphasis added.]

The substantial truth doctrine provides the definition of falsity that a plaintiff must prove to satisfy constitutional requirements. *Rouch, supra* at 259. Under this doctrine, minor inaccuracies in an expression are immaterial if the literal truth produces the same effect. *Id.* at 258-259. A court must examine the sting of the publication and its effect on the reader. *Id.* at 259. The doctrine protects a speaker who utters a statement that is subject to multiple interpretations by protecting the speaker's chosen interpretation. *Id.* at 265. As observed in *Hunter v Hartman*, 545 NW2d 699, 707 (Minn App, 1996), the substantial truth test is a broad test that looks to whether any reasonable person could find the statement to be a supportable interpretation of its subject. The context of the statement must be considered. *Id.* at 707; see also *Ireland, supra* at 618.

We conclude that plaintiff has not demonstrated any error in the trial court's conclusion that plaintiff failed to demonstrate a genuine issue of material fact with regard to the falsity element under the substantial truth doctrine. Although plaintiff's deposition established a factual dispute regarding whether the specific bathroom assault described in the song lyrics actually occurred, exactly where, when, and why an event occurs can be irrelevant to the sting of a story. See *Northland Wheels Roller Skating Ctr, Inc, supra* at 328. Further, even if a statement appears factual on its face, and provable as false, it is not actionable if a reasonable listener could not interpret it as stating actual facts about the plaintiff. *Ireland, supra* at 617.

Examined in the context of the song lyrics as a whole, defendant's story contains a number of signals that would convey to a reasonable person that it should not be taken literally. The extent of factual detail that a reasonable person would find unbelievable progresses as defendant's story is told. Examples include the highly improbable event of a school principal assisting plaintiff in "stomping" on defendant and leaving him for dead, plaintiff's successful attack on defendant with a broomstick after being beaten in the bathroom, and, ultimately, defendant returning home only to be beaten by his mother with a remote control, causing defendant's "whole brain" to fall out of his skull. It is apparent that a reasonable listener would not take the song lyrics about defendant literally. The sting of the song lyrics rests in their characterization of plaintiff as a bully, rather than the specific factual statements about the bathroom assault. Thus, the material question is whether the literal truth yields the same effect. *Rouch, supra* at 258-259.

In light of plaintiff's admissions that he "picked on" defendant when defendant was in the fourth grade and that plaintiff was part of a group at school that did "bully type things" such as pushing defendant down, we uphold the trial court's determination that no genuine issue of material fact was shown relative to this issue. Plaintiff's reliance on his affidavit for purposes of establishing a genuine issue of material fact is misplaced. Plaintiff's averment that he did not bully defendant was insufficient to create a genuine issue of material fact because it contradicted his earlier deposition testimony. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 479; 633 NW2d 440 (2001). Further, our task is to determine whether a reasonable listener could find the statements to be supportable interpretations of their subject. *Hunter, supra* at 707. The statements must have a different effect on the mind of the listener than the pleaded truth would produce. *Rouch, supra* at 259. Hence, plaintiff's own interpretation of the facts as establishing that he was not a bully did not create a genuine issue of fact.

Viewing the evidence most favorably to plaintiff, plaintiff's deposition indicates that plaintiff, acting as part of a group of friends, picked on defendant. Plaintiff described what was

done to defendant as “jokes, play games, you know, like we probably like – I mean this is kid stuff, so I’m saying. Call each other names, you now, saying skinny or something like that” Plaintiff also testified that he was present when his friends pushed defendant, and that he would personally bump into defendant by throwing a “little shove.” Plaintiff offered no evidence to refute defendant’s claims in his deposition that plaintiff was bigger than him, shoved him into walls, called him names, took his orange juice, and knocked over his books.

A reasonable person could interpret the uncontested facts as indicating that plaintiff, individually and as part of a group, bullied defendant. A “bully” is a “quarrelsome, overbearing person who badgers and intimidates smaller or weaker people.” *Random House Webster’s College Dictionary* (2001). Because the literal truth yields the same effect as the sting of the song lyrics, plaintiff did not meet his burden of showing a genuine issue of material fact under the substantial truth doctrine. Hence, the trial court properly granted defendant’s motion for summary disposition under MCR 2.116(C)(10).

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Donald S. Owens